

ISSUES

All the parties have challenged the finding by the Administrative Law Judge relating to the nature and extent of the disability. The Administrative Law Judge awarded benefits based upon a thirty-eight percent (38%) work disability. Claimant contends the award should be eighty-seven percent (87%) work disability. Respondent and Fund contend the award should be based upon a functional impairment rating only. Claimant also contends the Administrative Law Judge erred in his findings relating to the average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

(1) At the time of the alleged injury, claimant's average weekly wage was \$397.50.

The Administrative Law Judge found the claimant's average weekly wage to be \$282.53. This finding was based upon evidence from the vocational rehabilitation plan. The plan shows the wage to be \$282.53 but does not show the source of the information or disclose what compensation was included to calculate the wage.

Claimant testified she earned \$6.50 per hour and worked overtime. She indicated she usually worked around fourteen (14) hours per week overtime. She testified that her employer also provided health insurance and contributed to a thrift plan. The record does not indicate the cost of the health insurance. She testified she contributed approximately \$2.00 per week to the Thrift Plan. The Administrative Law Judge apparently found claimant's testimony lacked sufficient certainty to be relied upon. The Appeals Board agrees that the testimony lacked absolute certainty. However, the Appeals Board finds claimant's testimony to be more definitive than the gross wage reflected in the vocational rehabilitation plan. From claimant's testimony the base wage would be \$260.00 per week. Average overtime would be an additional \$136.50 and contribution to the thrift plan would be one-half of claimant's contribution or \$1.00 per week. This compensation combines to yield an average weekly wage of \$397.50. Although claimant's testimony does not provide the preferred definitiveness about her overtime hours, the Appeals Board, nevertheless, finds it adequate to sustain her burden.

In making this finding the Appeals Board notes claimant offered the above described testimony regarding her wages and overtime but respondent produced no evidence on the wage issue. The Administrative Law Judge pulled his finding regarding wage from the assessment plan, a document neither formally introduced into the record nor substantiated by testimony. Although it is claimant's burden to establish each of the elements of the claim, including the wage, the records relating to wage are generally in the custody and control of the respondent. With those factors in mind, the Appeals Board finds claimant's testimony to be sufficient to meet her burden.

(2) Claimant suffered a fifty-four and one-quarter percent (54.25%) permanent partial general disability.

Claimant began developing problems in her hands, arms, and left shoulder in October of 1990, in the course of her work for respondent. Claimant worked for respondent as a materials handler at the end of two machines, a sewing machine and a bottomer machine. The job duties required repetitive hand and arm activities. Claimant

received treatment for the injuries, principally from Dr. Majzoub. Dr. Majzoub took her off work in late 1990 or early 1991 and claimant has not returned to work for respondent, International Paper Company, since. Respondent argues that the award in this case should be limited to functional impairment for carpal tunnel in claimant's left wrist. Claimant, on the other hand, argues that the evidence establishes impairment to the body as a whole and supports a work disability award higher than that granted by the Special Administrative Law Judge. Specifically, claimant contends that under the facts and circumstances of this case, claimant's loss of access to the open labor market should be given greater weight because claimant has been unable to find employment despite repeated and persistent effort.

Respondent argues for a functional impairment to the left forearm because Dr. Majzoub initially rated only the left forearm. Dr. Majzoub first rated claimant August 7, 1991. He gave her a rating of five percent (5%) of the left hand which he converted to three percent (3%) to the entire body. He did not, at that time, give her any disability to the shoulders. He acknowledges, however, claimant had made complaints regarding her left shoulder on her first visit and continued to complain about her left shoulder over the period of approximately eight (8) months of his treatment. He also did not initially give her a rating for her right hand even though he did find positive tendinitis on the right side.

Claimant did not see Dr. Majzoub for almost two years. Dr. Majzoub then examined her on June 28, 1993, and at that time changed his rating to a general body rating of eight percent (8%) by including the shoulder and right upper extremity. Dr. Majzoub testified that the full extent of his general body disability rating was attributable to claimant's work, even though claimant did not work for respondent between the time of the first rating for the left hand and the later rating to the body as a whole.

Respondent argues Dr. Majzoub's change in rating cannot be justified. The record includes, however, other evidence lending credibility to Dr. Majzoub's general body rating. As indicated above, Dr. Majzoub notes complaints of the shoulder from claimant's first visit and apparently continuing unabated as of his last exam in June of 1993. He also found some confirmation of right side carpal tunnel syndrome in 1991. In addition, Dr. Prostic examined claimant on November 4, 1991. His findings were generally consistent with those of Dr. Majzoub but also strongly suggested permanent disability in both the right forearm and left shoulder at that time. On the right side he noted positive Tinel's and positive Phalen's test. On the left upper extremity he found substantial restriction of abduction and flexion of the shoulder, intermittent crepitus, and pain abducting the shoulder with both internal and external rotation. He concluded there was obvious carpal tunnel syndrome and recommended decompressive surgery of her carpal canals and injections of cortisone in the left shoulder. He also found evidence of suprascapular nerve entrapment and recommended cortisone and suggested that claimant should have injections to the suprascapular nerve area.

Dr. Robert Stringer, an orthopedic surgeon, also examined claimant in 1993. He evaluated claimant's shoulder complaints, and although his diagnosis was left shoulder discomfort with possible rotator cuff tendinitis, he concluded claimant had no permanent impairment in her shoulder. He considered claimant's complaints to suggest mild pain in the shoulder. He recommended physical therapy, anti-inflammatory medication and he recommended an exercise program to be continued at home. In spite of Dr. Robert Stringer's ultimate conclusion, the Appeals Board finds the evidence supports a finding of

permanent disability in the shoulder. Claimant complained of pain in the shoulder on her initial visit to Dr. Majzoub in 1991. The problems continued through the course of Dr. Majzoub's treatment and still remain as of 1993 exams by Dr. Majzoub and Dr. Stringer.

For the above reasons, the Appeals Board concludes claimant is entitled to an award based upon a general body disability. The record also supports the finding claimant is entitled to an award for work disability. Dr. Majzoub, the authorized treating physician, sent a letter to International Paper requesting claimant be taken off work. Both Dr. Majzoub and Dr. Prostic have recommended restrictions which would prohibit her from returning to work at International Paper. Dr. Majzoub recommended that she not lift more than ten to twenty (10-20) pounds and that she not engage in work that requires repeated flexion and extension of the wrist or activities that require her to raise her left arm above her shoulder. Dr. Prostic recommended that she not lift in excess of forty (40) pounds on a single basis or thirty (30) pounds occasionally. He indicates she could lift up to twenty (20) pounds as much as five (5) times per hour. He also recommended that she avoid overhead use of either hand and avoid repetitive or forceful use of either hand. Claimant has been unable to find employment at a comparable wage under these restrictions. The Appeals Board finds claimant is entitled to work disability based upon the evaluation of her injuries and their impact on her ability to obtain employment in the open labor market and her ability to earn a wage comparable to that earned in her work for respondent. K.S.A. 1992 Supp. 44-510e.

The Administrative Law Judge found work disability and gave equal weight to the two vocational experts' opinions and equal weight to claimant's loss of access to open labor market and loss of ability to earn comparable wages. The Appeals Board agrees with the method followed, but the change in the average weekly wage requires adjustments.

Experts testified regarding the components of work disability. Mr. Monty Longacre testified that based upon Dr. Prostic's restrictions, claimant lost sixty-three percent (63%) of her ability to perform work in the open labor market and based upon Dr. Majzoub's restrictions, claimant lost fifty-five percent (55%). Ms. Karen Sherwood testified that based upon the combined restrictions suggested by both Dr. Prostic and Dr. Majzoub the claimant had lost seventy-four percent (74%) of her ability to perform work in the open labor market. By giving equal weight to the opinions of both experts, as approved in Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993), the Appeals Board finds the claimant suffered a sixty-six and one-half percent (66.5%) loss of ability to perform work in the open labor market.

Both experts also testified regarding claimant's reduced ability to earn comparable wages. Ms. Sherwood opined that claimant should be capable of performing work in Kansas and earn from \$172.00 to \$220.00 per week. By comparing these figures to an average weekly wage of \$282.53, she computed that claimant's ability to earn a comparable wage had been reduced by nineteen to thirty-nine percent (19-39%). Ms. Sherwood also expressed her opinion that if claimant were able to undergo re-training programs, she would be able to earn between \$240.00 and \$260.00 per week. The record does not support a conclusion that retraining is probable in this case. The Appeals Board, therefore, will rely upon the opinions related to entry-level jobs at \$172.09. to \$220.00 per week. The Appeals Board also compares this figure to the average weekly wage of \$397.50, as found above. In comparison this computes to a forty-nine percent (49%) loss of ability to earn a comparable wage. Mr. Longacre projected claimant could earn up to

\$260.00 per week. When this figure is compared to the average weekly wage of \$397.50, the result is a thirty-five percent (35%) loss of ability to earn a comparable wage.

Claimant argues that in this specific circumstance, as shown in this case, claimant should be entitled to an award based primarily on her loss of ability to access the open labor market. Claimant so argues from evidence that claimant made numerous attempts to find employment. On several occasions she contacted Dr. Majzoub and Dr. Majzoub recommended that she not accept employment because of her injuries. The Appeals Board is not, however, persuaded that the loss of access should be accorded greater weight in this case. By giving equal weight to both loss of access and loss of ability to earn a comparable wage, the Appeals Board finds the claimant suffered fifty-four and one-quarter percent (54.25%) permanent partial general impairment. From a review of the record as a whole, the Appeals Board considers this finding, arrived at by weighing equally the experts' opinions and the work disability factors, a more accurate assessment of claimant's permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 29, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of claimant, Sonya Gravitt, and against respondent, International Paper Company, and its insurance carrier, Liberty Mutual Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on November 9, 1990, and based upon an average weekly wage of \$397.50 for 74.71 weeks of temporary total disability compensation at the rate of \$265.01 per week or \$19,798.90 followed by 340.29 weeks at the rate of \$143.77 or \$48,923.49 for a 54.25% permanent partial general body work disability, making a total award of \$68,722.39

As of January 20, 1995, there is due and owing claimant 74.71 weeks of temporary total disability compensation at the rate of \$265.01 per week or \$19,798.90, followed by 144.43 weeks of permanent partial disability compensation at the rate of \$143.77 per week in the sum of \$20,764.70, for a total of \$40,563.60 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$28,158.79 is to be paid for 195.86 weeks at the rate of \$143.77 per week until fully paid or further order of the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Future medical will be considered upon proper application to the Director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

In accordance with the stipulations, ninety percent (90%) of the compensation, medical expenses and costs are to be paid by respondent and ten percent (10%) by the Kansas Workers Compensation Fund.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 90% to the respondent and 10% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Martin D. Delmont Transcript of Preliminary Hearing (4-30-92)	\$274.90
Transcript of Preliminary Hearing (7-1-93)	\$95.85
Transcript of Motion Hearing (3-27-92)	\$78.90
Transcript of Motion Hearing (9-24-93)	\$84.35
Transcript of Regular Hearing	\$69.20
Hostetler & Associates Deposition of Karen Sherwood	\$321.85
Deposition of Edward J. Prostic, M.D.	\$260.05
Patricia K. Smith Deposition of Sonya Gravitt	\$321.90
Deposition of Hish S. Majzoub, M.D. (3-11-93)	\$153.00
Deposition of Monty Longacre	\$197.90
Deposition of Robert F. Stringer, D.O.	\$135.00
Shaun J. Higgins Deposition of Hish S. Majzoub, M.D. (10-28-93)	unknown

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER _____

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
John I. O'Connor, Pittsburg, KS
Edwin H. Bideau, Chanute, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director